

## CRITERIA OF FEDERAL WELFARE EXPENDITURES: A LAWYER'S VIEW

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In a discussion of criteria of Federal expenditures for health, education, and welfare, the role of the lawyer must be a minor one. Constitutional considerations have become of minimal importance as limiting factors in the formulation of policy. It still needs emphasis, however, that the breadth of congressional authority is not universally apprehended, and that policy decisions may, for that reason, be more restrained than they need be.

Federal expenditures for the provision of benefits or services to individuals are of two kinds; grants-in-aid to the States, on the one hand, and direct Federal action, on the other. In the case of grants-in-aid, the lawyer must content himself with urging that, as a general rule, legal considerations (including "States rights," if legal rights are implied by the phrase) should have little to do with the shaping of broad national policies. In the case of the one general program of direct Federal action, the national system of social insurance, legal or quasi-legal considerations are more immediately involved, and the lawyer may properly recommend, as a criterion of congressional action, a meticulous respect for the integrity of the contributory system and the complete and faithful carrying out of the promises made to contributors.

Until 20 years ago, no one could say with assurance that expenditures for the health, education, or welfare of the people at large were within the powers conferred upon the National Government by the Constitution. Grants had been made to the States, both of land and of money for education, and, occasionally, of money for other purposes; but even these grants, which left operating programs in the hands of the States, could claim to exist only by constitutional sufferance.<sup>1</sup> And even if grants-in-aid for these purposes were valid, a circuit court of appeals and two Supreme Court Justices were able to hold, as late as 1937, that direct Federal expenditure for the welfare of the aged invaded the constitutional prerogatives of the States and violated the 10th amendment.<sup>2</sup> Certainly, the powers of the National Government in this whole area were hemmed in by doubts.

The doubts were set at rest by the Social Security cases.<sup>3</sup> Those

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<sup>1</sup> *Massachusetts v. Mellon*, 262 U. S. 447 (1923). Attacks on grants-in-aid for maternal and child health were dismissed on jurisdictional grounds. In the course of the opinion, the Court indicated plainly that no constitutional rights of the States were violated, but the basic question of the scope of the national power of expenditure was not reached.

<sup>2</sup> *Davis v. Edison Electric Illuminating Co.*, 89 F. 2d 393 (1st Cir. 1937), reversed in *Helvering v. Davis*, 301 U. S. 619 (1937). Justices McReynolds and Butler based their dissent from the reversal on the 10th amendment.

<sup>3</sup> *Helvering v. Davis*, *supra*; *Steward Machine Co. v. Davis*, 301 U. S. 548 (1937). These cases were decided by the same 9 Justices who had invalidated so much early New Deal legislation; and it is significant that 7 of them (including Sutherland and Van Devanter) concurred in the decisions on the principal constitutional issues.

decisions established the power of expenditure as a separate power of the National Government, coequal with the other powers enumerated in the Constitution, and specifically held that congressional action in this area is not invalidated by the 10th amendment and must prevail over any inconsistent policy of the States. The full significance of these decisions has been slow of acceptance; we find the Congress, as recently as 1953, speaking of health, education, and welfare as fields which "may be" constitutionally the primary responsibility of the States.<sup>4</sup> One cannot quarrel with the assignment of this responsibility primarily to the States if the assignment is made on grounds other than constitutional, but, once the power of the National Government was established, there ceased to be reason to attribute to the Constitution a preference for State action to provide public benefits or public services. A national government created to promote the general welfare, and empowered to raise and spend money for that purpose, cannot be relegated, a priori, to a secondary role in meeting the needs of the people.

#### NATIONAL AND STATE POWER

The existence of a national power of expenditure for these purposes does not limit the authority of the States in any such way as does the national power to regulate interstate and foreign commerce.

It follows that the distribution of welfare functions between National and State Governments, and the shaping of programs at both governmental levels, are matters for legislative determination essentially uninhibited (except where discrimination is alleged) by constitutional limitations.<sup>5</sup> But, if concurrent authority in the two levels of government is not to lead to wasteful duplication of effort or other anomalies, determinations by each of the many legislative bodies involved must be made with an eye to what is being done at the other governmental level. In this process of mutual adjustment, Congress must necessarily take the lead, because Congress speaks with a single voice while the States speak with 48 different voices—whereas each State can adjust itself to a single national pattern, national legislation can hardly be adjusted to 48 State patterns. This political necessity for national leadership has been reinforced, in dealing with programs as costly as those addressed to health, education, and welfare, by the greater fiscal resources of the Central Government. Not only, then, has the National Government in the past 20 years been placed on a constitutional parity with the States in the matter of expenditures for the general welfare, but in a very real sense, it has been forced into a position of primacy in blocking out those basic policies that are of nationwide concern.

On the record of these 20 years it can fairly be said that Congress has recognized and in large measure discharged the responsibility thus

<sup>4</sup> 67 Stat. 145. This was the act creating the Commission on Intergovernmental Relations.

<sup>5</sup> The statement in the text relates to expenditures as such, and not to ancillary regulatory measures such as compulsion to attend school, compulsory quarantine of infectious disease, and the like. Even with respect to expenditures there may be an outer boundary to permissible legislative action; in *Helvering v. Davis*, the Court, perhaps with an eye to the Townsend plan, left room for such a holding. Expenditures, of course, must be for a public purpose or, in the case of the National Government, for the general welfare.

There is probably also a constitutional limitation, analogous to the prohibition of discrimination, upon expenditures which exact the surrender of constitutional rights unrelated to the purpose of the expenditure. See Justice Frankfurter concurring in part and dissenting in part in *American Communications Assn. v. Douds*, 339 U. S. 382, 417 (1950).

cast upon it, and has done so without abusing the enormous power which the social-security cases showed it to possess. The grant-in-aid has become the established mechanism through which the National Government has helped the States do better those things that are within the competence of the States; while despite the power to do more, direct national provision of benefits or services (except to selected groups who are of special national concern) has been confined to a single program—long-term social insurance—which the States are not in a position to operate.

There are many reasons, both objective and subjective, to prefer State and local programs for health, education, and welfare wherever they are practicable, and Congress has shown itself sensitive to these considerations; at times, some have thought, unduly sensitive. But Congress has been ever aware that a chief obstacle to adequate programs is their great cost in relation to State and local tax resources, and in the grant-in-aid it has found a happy device to enable these programs to draw upon the national fisc without converting them to national operation. Indeed, since Nation and States share the power and the responsibility to provide for the general welfare, the grant-in-aid is an appropriate response wherever a need is widely felt and costly to meet.

It is a contradiction to urge, as is sometimes done, that a grant must be justified by some national interest distinct from the interests of the States; for the general welfare is itself, by constitutional mandate, a national interest. By the same token, objection to grants-in-aid based on "States rights" is an anachronism if it fails to take account of the Nation's rights as well. A Congress which in meeting a substantial part of the cost contents itself with the imposition of a few basic standards as conditions of its aid ought to be credited with self-restraint, not condemned for usurpation.

Defense of the grant mechanism in principle should not belittle the difficulties that arise in its practical application. But whatever the shortcomings of existing grants, the mechanism is without doubt the best yet discovered<sup>6</sup> to enable the Federal Government to participate in welfare programs without monopolizing them—an objective which seems to have motivated most congressional legislation in this area and to accord best with the people's preference to have these matters dealt with near at home.

#### THE NATIONAL SYSTEM OF SOCIAL INSURANCE

The one outstanding and conspicuous exception to the policy of leaving welfare programs to State operation is, of course, old-age, survivors, and disability insurance.<sup>7</sup> Given the present structure of

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<sup>6</sup> Grants in kind have occasionally been used, as have details of Federal personnel, to supplement cash grants. The tax-offset device in unemployment compensation is a substitute for a grant-in-aid, but is one not likely to be repeated in other programs.

<sup>7</sup> Benefits for veterans, railroad workers, and merchant seamen are not true exceptions since they are for groups of special Federal concern and could probably be sustained independently of the general-welfare clause—the first under the war power, and the other two under the commerce clause (but see *Railroad Retirement Board v. Alton Railway Co.*, 295 U. S. 330 (1935)). The Hospital Survey and Construction (Hill-Burton) Act is a partial exception, involving a combination of Federal and State administration and requiring no State financial participation. There are of course many direct Federal expenditures in this field for other than the immediate provision of services or benefits to individuals, such as payment of the administrative costs of the Department of Health, Education, and Welfare and its constituent units, expenditures for research, and the like.

that system, relating benefits to lifetime earnings as it does, the reasons for direct national operation are self-evident: Many factors most notably the mobility of our population, would make operation of State-by-State systems anything like old-age, survivors, and disability insurance quite impracticable. But the question runs deeper if we ask why the system is structured as it is, and the answer depends upon an understanding of the nature of contributory social insurance; for if, as some still assert is the fact, old-age, survivors, and disability insurance were nothing but a system of taxing one group of people and spending the proceeds for the benefit of other groups of people, there would be no fundamental reason that the needs of these other groups could not be met by the States, with such Federal aid as Congress might deem appropriate. It is because social insurance involves a commitment for the long-term future that it must be constituted as it is, and thereby put beyond the range of State action.

Old-age, survivors, and disability insurance is of course a system of taxing and spending, but it is also something more than that. The best testimony on the latter point, more persuasive than any theoretical argument, is the insistence of organized labor that payroll taxes be increased when benefits are enlarged. It is not usual to find organized groups of taxpayers demanding that their taxes be raised, and when such a demand is made it is the strongest kind of evidence that something in addition to the payment of taxes is at stake.

The something in addition, in this case, is the integrity of contributory social insurance. The values which labor, along with most of the American people, sees in this system of insurance have been too often stated to need more than the briefest of restatements here. First in order of importance, perhaps, is that contributory insurance enables people to earn their own way, which most prefer to asking for charity even from the State. It is not very important what portions of the old-age, survivors, and disability insurance benefits are in fact earned by contributions; one can accept a generous bargain and keep his self-respect, as many find it difficult to do in accepting help labeled as "charity" and available only on proof of poverty.

Then, too, aside from its psychological importance, the absence of a means test in old-age, survivors and disability insurance means that the benefits of that system form a nestegg to which each person is free to add what he can through individual savings or private group arrangements—something that is automatically ruled out when benefits are conditioned on poverty. Finally (and this is a point overlooked by some and disputed by others) contributory social insurance holds far greater assurance than any other system that the promised benefits will actually be paid when they fall due, whether their due date is next year or is 30 or 40 years hence. If we are to enable men to plan their own economic futures and the economic security of their families, if we are to relieve men's minds as best we can of the haunting fear of destitute old age, or destitution of their dependents if they should die, we must give the promises we have made them all the certainty of fulfillment that is possible in a world of fallible human beings. This the structure of old-age, survivors and disability insurance is designed to do, and this it does better than any other system yet devised.

Congress has repeatedly evidenced its judgment that the values of contributory social insurance outweigh in this instance the usual argu-

ments for State or local operation of welfare programs, and the popular consensus is clearly in accord. But realization of these values could easily be jeopardized, either by lack of sufficient congressional vigilance in amending the statutes or by loss of popular credence in the promise which the statutes make.

These dangers are not imaginary. The former hazard is illustrated by the proposal a few years ago to blanket in the millions of so-called unprotected aged and pay them minimal pensions from the trust fund—a proposal which, tempting though it was in other ways, would have undermined the contributory principle and destroyed the rationale of payroll taxes. The other hazard loomed in the early days when the financing of the system was under attack as improper and even fraudulent—an attack which ought never to have been made and which, despite its constant reiteration, seems not appreciably to have impaired popular confidence in the system. Both these hazards have apparently been safely passed, but a new attack has developed which seeks to show that the system accords its present contributors no certainty that the benefits now promised them will not be curtailed or withdrawn in the future. If contributors generally should come to believe this, the values of social insurance would be largely lost, and it would be a serious question whether we should not revert to State-administered programs of some sort.

The essence of social insurance consists in the assurance of future payments. In old-age, survivors, and disability insurance this assurance is effected, not by contracts with the contributors which might disastrously freeze the benefit structure, but by several aspects of the system which in combination go about as far as to commit future Congresses as it is legally possible to go. In the first place, Congress has struck an implied bargain by the very fact of imposing taxes of a kind that would never be tolerated except as a quid pro quo for promised benefits—most conspicuously, by imposing an income tax with no personal exemption, a tax limited to earned income, a tax which excludes all income above \$4,200 a year. It has imposed these special taxes in amounts sufficient, as far as can now be known, to pay the whole cost of old-age, survivors, and disability insurance over the indefinite future, and it has dedicated the proceeds of these taxes—for practical purposes, has dedicated them irrevocably—to meeting the cost of benefits and administration. Finally, by labeling the system “insurance” Congress has made its commitment to the contributors explicit. Being a moral and political rather than a legal commitment, it cannot be defined with precision, but it is hardly the less binding for that.

Despite these considerations, the existence of any effective commitment is challenged by some, who assert that old-age, survivors, and disability insurance is no more than a method of taxing the present labor force and its employers for the use of those now on the benefit rolls, and that the system gives no assurance that people now working, or their survivors, will receive the promised benefits when their working days are ended. There is no evidence that the enormous popular support of old-age, survivors, and disability insurance has thus far been affected in the least by these contentions, but they have a superficial plausibility that makes them dangerous.

One piece of this argument depends on a misapprehension of what was argued to the Supreme Court and decided by it in sustaining the

old-age insurance provisions of the original Social Security Act. Those provisions, like all their subsequent modifications, consisted of a taxing part and a spending part. Each part was attacked on various constitutional grounds and each was sustained. There the Court's function ended; if each part was valid, it was of no concern to the Court that the two might be so dove-tailed as to constitute together a system of contributory social insurance. Significantly, the word "insurance" does not appear in the Court's opinion. If the commanded payments were valid taxes, it was of no importance that they might also be properly described as compulsory contributions or premiums; all taxes, indeed, are compulsory contributions. The Court neither affirmed nor denied that the system was social insurance, for that was none of its concern. It is true that the Department of Justice in its brief equivocated on this point, but since the point was not in issue this merely means that the Department confined its arguments to the constitutional questions that were before the Court. It is hard to take seriously an attempt to use this brief, written 20 years ago by lawyers to whom social insurance was an unfamiliar concept, to support the thesis that Congress has for many years been misleading the people by calling the system insurance. At any rate, the advocate purposes, the Court disposes; and the effort to disparage the system finds not a scintilla of support in the opinion of Mr. Justice Cardozo.

Another facet of the attack on old-age, survivors, and disability insurance is the contention that the system is not insurance because the benefit rights are created by statute rather than by contract, and because Congress has reserved to itself the right to amend or repeal the act. Ordinarily argument about definition would be of only academic interest; obviously social insurance differs in a number of respects from private insurance, and does not meet altogether definitions framed to describe the latter. In this instance, however, nomenclature is of some importance because the word "insurance" has been used by Congress presumably for the very purpose of underscoring the commitment implicit in the operative provisions of the statute. It is therefore pertinent to note that the United States Supreme Court has characterized as "industrial insurance" some statutes which confer benefit rights.<sup>8</sup>

More recently the Court has held that a system of disability payments established by an employer constituted health insurance although there were no employee contributions, the benefits were payable from the employer's own funds without the intervention of an insurance carrier, the benefits varied with length of service, and the whole scheme could be changed or terminated by the employer except for benefits to which an employee had already become entitled.<sup>9</sup> The Court remarked that it was merely construing the term "health insurance," as used in the Internal Revenue Code, in accordance with "its broad general meaning." If a private scheme of this sort is insurance, it would seem quite clear that old-age, survivors, and disability insurance, the benefits of which are fixed by the law of the land, is entitled to be so described.

<sup>8</sup> *Grange Lumber Co. v. Rowley*, 326 U. S. 295, 299, 303 (1945). The Court remarked that "the State supreme court has characterized the system \* \* \* as an industrial insurance statute having all the features of an insurance act."

<sup>9</sup> *Haynes v. United States*, 353 U. S. 81 (1957).

But it is said or implied that Congress, if it wished to create a system entitled to be called insurance, ought to have done so by contract, and authority is cited that the United States cannot constitutionally repudiate its contracts.<sup>10</sup> Aside from the serious doubt that in a system of compulsory insurance one Congress could thus bind its successors,<sup>11</sup> and aside from the folly of so doing if it could, a contractual system would give no more legal assurance of ultimate payment than does the present system—no assurance, that is, which the courts could enforce in the event of hostile congressional action. For a Congress bent on repudiating its insurance commitment could always withdraw the right to sue the Government and withdraw appropriations available for the payment of benefits, as it did in order to prevent windfalls when the Supreme Court affirmed the inviolability of gold-clause bonds.<sup>12</sup> The right to do these things cannot be relinquished by Congress, and contractual rights, no matter how inviolable, become hollow when there are no funds to meet them and no right to sue for their enforcement. Contributors are and in the nature of things must be dependent on Congress, and not on the courts, for the ultimate protection of their insurance rights.

The points thus far discussed provide no more than a smokescreen for the one real argument, that the reservation of power to amend or repeal the benefit provisions of old-age, survivors, and disability insurance makes the congressional promise embodied in those provisions illusory. The power to amend would almost certainly have existed though it had not been expressly reserved, but in any case its existence was and is essential in a system as vast and complex as this. In the 22 years since their enactment the original provisions have been changed many times and almost beyond recognition, and there is no reason to suppose that finality has even been approached. These amendments have redounded to the very great benefit of the contributors to the system; indeed, the increase of benefits as the cost of living has risen means that social insurance has afforded a degree of economic security, when measured by the purchasing power of the benefits, that private insurance cannot equal.

But change in the benefit structure may involve something other than a simple increase in amounts, and a grave problem is posed whenever the process of amendment leads to the abrogation or reduction of benefits previously promised. Can such action be reconciled with the underlying commitment implicit in old-age, survivors, and disability insurance?

The answer depends basically on whether the action is taken as a necessary incident to an improvement of the system, and thus accords with the basic purpose for which the power of amendment was reserved. Repeal in 1939 of the provision of the original Social Secu-

<sup>10</sup> *Lynch v. United States*, 292 U. S. 571 (1934). The opinion in this case itself largely refutes the contention for which the case is cited, for it plainly recognizes that if Congress had undertaken to withdraw the right to sue, the Court would have been compelled to reach a different conclusion.

<sup>11</sup> Payment of a tax which one is legally required to pay, unlike the voluntary payment involved in the Lynch case, ordinarily does not constitute such legal consideration as is essential to the formation of a valid contract. A promise of benefits in consideration of the payment of taxes would therefore presumably be legally repealable. Possibly Congress could make a binding promise in consideration of the performance of work in covered employment, but it seems unlikely that the Supreme Court would extend the doctrine of the Lynch case to an arrangement in which the promisee has really surrendered nothing.

<sup>12</sup> 49 Stat. 938, 31 U. S. C. 773 (b), 773 (c).

rity Act by which persons dying without qualifying for monthly benefits should receive a generous refund raised no significant objection, because there were substituted survivors' benefits of greater value to nearly all concerned, but even so it was fortunate that the change could be made before "money back" rights had built up to any great size. This change was clearly an improvement, and its desirability illustrates the need for an element of flexibility in the congressional commitment even though a handful of people may suffer a minor loss. The same cannot be said, unfortunately, of amendments with respect to deportees and convicted subversives which, even in the relatively temperate form in which they were finally enacted, smack more of punishment than they do of any true purpose of the insurance system. Somewhere between these two stands the curtailment of the rights of nonresident aliens, which illustrates a potentially serious problem for the future. No one could have objected very strenuously if it had been decided originally that nonresident aliens who had been in this country only a short time should not receive the bonanza which it was felt necessary to provide generally to those who have been in covered employment only briefly. But once the promise had been made to these aliens, its repudiation would probably have raised a good deal of protest except for the fortunate coincidence that the victims were too far away to be heard.

Let us suppose that certain dire but improbable prophecies should be borne out by the fact, and that the recently enacted disability benefits should prove in the next few years to be disastrously expensive and entirely unworkable. Could a formula for their repeal be devised that would do substantial justice to the millions of people who have made additional contributions from their pay envelopes for disability protection? This is an extreme and unlikely case, but it illustrates the difficulty of revising a commitment that will run, for many individuals, 50 or 60 years into the future. Even the Congress can make mistakes, and in old-age, survivors, and disability insurance it has made the correction of any excess of liberality an extraordinarily difficult problem.

It has been well said that the insurance system, though not contractual in nature, is "vested with the aura of a contract."<sup>13</sup> From all evidence, people generally are not in the least disturbed by the difference between a contract and an aura. The reason for this is not far to seek; it means simply that people have confidence in the Congress of the United States. After all, Congress has it in its power to honor or dishonor all fiscal obligations of the Government, and the credit of the United States is the best in the world. Surely those who foresee fiscal irresponsibility in the case of social insurance have the burden of showing grounds for their fears, a burden all the heavier because so many of every congressional constituency have a stake in old-age, survivors, and disability insurance.

If improvements in the future require some modification of existing benefit rights, as they may, we can trust to Congress' sense of obligation and sense of fair play to assure that contributors are treated equitably. The greater danger lies in changes that may appear minor or even trivial, that injure only a few, or injure only those who for

<sup>13</sup> Security, Work, and Relief Policies, H. Rept. Doc. No. 128, pt. 3, 78th Cong., 1st sess. (Washington: G. P. O., 1943), p. 523.



one extraneous reason or another may not enjoy the sympathies of the people at large. Here, the reserved power of amendment may lure the Congress into actions which it would not consider if there were a binding legal commitment, actions which find no warrant in the purposes of the insurance system itself. However politically innocuous such amendments may appear, however the ethical questions they raise may be resolved, they will exact a price far beyond their immediate significance if they can be used to disparage in the public mind the Government's undertaking to pay the promised benefits. Even the smallest seeds of doubt could be dangerous, for no one can know that some may not land on fertile soil. What happens to a handful of people, even unpopular people, can be held up by those who choose to do so as an example of what might happen to the rank and file in a period of financial stringency. No one can know at just what point public confidence might begin to be shaken, or what the consequences would be if it were, but one probable consequence is that payroll taxes would become very unpopular indeed, ultimately perhaps too unpopular to survive. The risk is not worth taking, for the stakes are too high.

There are people in positions of influence who apparently still believe that the adoption of compulsory social insurance was a mistake and have not given up hope of effecting its abandonment, and presumably of bringing about a return to the public-assistance approach as the only public aid available to those now within the ambit of old-age, survivors, and disability insurance. Frontal assault on the insurance system at the present time would be hopeless, and these dissenters have now hit upon its most vulnerable point, the lack of a precise and definitive commitment for the future, in an effort to weaken public support for the system that they would like ultimately to see abandoned. Complacency in the face of this attack would be unwise, for there is a color of truth in the argument which, under some conditions, could render it effective. Congress itself is the only body that can render this destructive argument futile, and it can best do so by rejecting every amendment that would withdraw or curtail the benefit rights of any person unless the amendment is required, and can be justified to the people, as a necessary incident in the continuing process of strengthening and improving the system.